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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MB Docket Nos. 11-43 & 12-108

Dear Ms. Dortch:

On October 14, 2016, Diane Burstein, Vice President and Deputy General Counsel, Jill Luckett, Senior Vice President, Program Network Policy, and I, of NCTA – The Internet & Television Association ("NCTA"), met with Susan Aaron, Royce Sherlock, and Marilyn Sonn of the Office of General Counsel, and Maria Mullarkey and Mary Beth Murphy of the Media Bureau, regarding the above-captioned proceedings implementing the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA").

At the meeting, we explained that NCTA member companies are committed to providing video-described programming, which includes a growing library of described programming.[1] However, consistent with our comments in this proceeding, we stressed that certain proposals contained in the recent *Notice* in this proceeding exceed the Commission's authority under the CVAA and should not be adopted.[2]

We explained that the statutory language reflects that Congress specifically and intentionally limited the Commission's authority to act in this area.[3] In particular, it directed the Commission to reinstate the video description rules previously vacated by the D.C. Circuit, and allowed modifications to those rules "only as" delineated in subsection (2)(B) of Section 613.[4]

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1 *See* NCTA Comments at 1; *see also* Time Warner Inc. ("TWI") Reply Comments at 2; *see also* NAB Comments at 2. Unless otherwise indicated, all comments and reply comments cited herein were filed in MB Dkt. No. 11-43 on June 27, 2016, and July 26, 2016, respectively.

2 *See* NCTA Comments at 3-13.

3 *See Chevron USA Inc. v. National Resources Defense Council, Inc.*, 467 US 837, 842-43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

4 Mere weeks ago, the Commission cited to this very language in support of its argument that "[w]here Congress intends to limit the Commission's rulemaking authority to specified areas, it has done so expressly." *In re Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, FCC 16-129, MB Dkt. No 16-41 ¶ 36 & n.137 (Sept. 29, 2016) (citing §§ 613(f)(1), (2) as

We explained that subsection (4) ["Continuing Commission Authority"] sets forth the specific and limited modifications the Commission may adopt only after conducting the "Inquiries on Further Video Description Requirements" set forth in subsection (3). The CVAA does not provide the Commission authority to revise its reinstated video description rules in the wholesale fashion proposed in the *Notice*.[5] Moreover, an examination of the legislative history confirms Congress' underlying intent to provide only limited and specific authority to the Commission to modify the reinstated rules.[6] Accordingly, while Congress granted the Commission authority to increase the number of hours of video described programming assuming certain showings are made, we stressed that any increase in the number or nature of nonbroadcast networks covered by the rules, adoption of a "no backsliding" rule, or extension of any video description obligation to programming offered on a video-on-demand basis would be inconsistent with the CVAA.[7]

In addition, consistent with our comments in the record, we explained that neither the CVAA nor the Television Circuitry Decoder Act provides the Commission with authority to adopt mandates for accessing closed captioning features and functions settings on user interfaces.[8]

Respectfully submitted,

/s/ Stephanie L. Podey

Stephanie L. Podey

cc: Susan Aaron
Maria Mullarkey
Mary Beth Murphy
Royce Sherlock
Marilyn Sonn

"directing the Commission to reinstate its video description regulations adopted in *Report and Order*, 15 FCC Rcd 15230 (2000), and to modify those rules 'only as follows'").

5 *See* NCTA Comments at 4-5.

6 *See id.* at 6 & nn.19-20 (citing H.R. Rep. No. 111-563, at 29 (2010), and S. Rep. No. 111-386 (2010)).

7 *See id.* at 5-11. We also explained that a narrow reading of the Commission's authority is necessary to avoid the significant First Amendment issues inherent in a mandate to create additional programming content where Congress has not expressly authorized such action. *See MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002); *see also* NCTA Comments at 5, n.14; MPAA Comments at 5-6; Time Warner Inc. Reply Comments at 5, n.11.

8 *See* NCTA Comments at 2-5, & n.7, filed in MB Dkt. No. 12-108 (Feb. 24, 2016); NCTA Reply Comments at 2-3, filed in MB Dkt. No. 12-108 (Mar. 7, 2016).